

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA v. MAJID SHOUKAT KHAN	AE 039N CLARIFICATION TO AE 039H INTERIM ORDER Government Motion to Protect Against Disclosure of National Security Information 10 April 2020
---	--

Procedural History: In AE 039I,¹ the Prosecution requested “the Commission partially reconsider and clarify AE 039H,² Interim Order. Specifically, the Prosecution requests that the Commission reconsider and clarify the portion of its order requiring certain prospective witnesses to take an ‘introductory telephone call’ from defense counsel in this case, as doing so outside of the procedure described in Section III.B. [of AE 039I] would likely cause the unauthorized disclosure of classified information.”³ The Defense responded (AE 039J)⁴ arguing the motion should be denied as the Government had not satisfied the reconsideration standard; the original order (AE 039H) was clear: to strike the *ex parte* declaration submitted by the Government in support of its motion (AE 039I), deny the original request for a protective order (AE 039),⁵ and order

¹ AE 039I, Government Motion to Reconsider and Clarify AE 039H, Interim Order, filed 9 March 2020.

² AE 039H, INTERIM ORDER, Government Motion to Protect Against Disclosure of National Security Information, dated 27 February 2020.

³ *Id.* at 1.

⁴ AE 039J, Defense Response to Government Motion to Reconsider and Clarify AE 039H, Interim Order, filed 30 March 2020.

⁵ AE 039, Government Motion to Protect Against Disclosure of National Security Information, filed 3 September 2019.

production of the remaining seven (7) prospective witness in Category 3 and Category 4 at issue in AE 030.⁶ The Government replied in AE 039M.⁷

Discussion: The Commission can see how it may have overreached and caused the Prosecution to be confused with the language “The prospective witnesses will take these telephone calls” and “via secure means if required” found in the original order. The Commission is not moved or persuaded by the Defense’s arguments in their response and is even less moved by the Government’s reply. The Commission will seek to clarify its intent, which the Prosecution has fairly well divined in Section III.B. of AE 039I.

CLARIFYING INTERIM ORDER:

1. The Prosecution is instructed to use its good offices to coordinate telephone calls between each of the seven (7) identified Defense Requested Witnesses and the Defense Team. The individual telephone calls can originate from the Defense Requested Witness or the Defense Team, whichever is simpler to accomplish and satisfies national security concerns. The telephone call can occur on a secure line with both the Defense Requested Witness and/or the Defense Team in secure locations/facilities, as is appropriate. In coordinating the telephone call the Prosecution can provide the Defense Requested Witness, in an appropriate manner, information sufficient to orient the Defense Requested Witness to whom the telephone call is with and the general purpose of the telephone call. The Government is directed to draw heavily from the Defense’s pitch recited during oral argument on 20 November 2019.⁸ It is the Commission’s hope the Defense Requested Witnesses will act in good faith and will participate in the telephone calls and listen to the Defense

⁶ AE 030, Defense Motion to Compel Production of Witnesses, filed 1 March 2019.

⁷ AE 039M, Government Reply to Defense Response to Government Motion to Reconsider and Clarify AE 039H, Interim Order, filed 6 April 2020.

⁸ See Unofficial/Unauthenticated Transcript of the *U.S. v. Majid Shoukat Khan* Motions Hearing (Transcript), dated 20 November 2019, p. 514.

Team's proposal as this Defense Team is not the Defense Team in the *Mohammad* case. To be clear, the Commission is not ordering or authorizing the disclosure of classified information in any form or format in connection with the coordination of and conduct of these telephone calls.

2. Given the current national public health emergency caused by the COVID-19 virus,⁹ the Commission is cognizant the coordination for and accomplishment of the seven (7) telephone calls will take additional time. The Prosecution and Defense are instructed to make good faith efforts, as officers of the court, to coordinate for and conduct these telephone calls in a manner consistent with instructions and guidance from their superiors, taking into consideration similar instructions which may have been provided to the Defense Requested Witnesses by their superiors. It is not the intent of the Commission that anyone place their personal health in jeopardy in fulfilling the requirements of this clarifying order. At the same time, it is the intent of this Commission that this process move forward and the Defense be able to report back to the Commission whether any of the Defense Requested Witnesses are willing to speak to them and later possibly file supplemental justification for the production of the Defense Requested Witnesses. To this end, the Commission advises the Defense to prepare letters to the Defense Requested Witnesses so the Prosecution can coordinate to have them delivered to the Defense Requested Witnesses should telephonic contact

⁹ In AE 046, This Military Commission took judicial notice of the President of the United States' 13 March 2020 declaration that the COVID-19 outbreak in the United States constitutes a national emergency and the guidance from the Centers for Disease Control and Prevention to "socially distance" people from each other. *See* AE 046, INTERIM ORDER, Temporary Extension of Briefing and Litigation Suspense Due to Impacts of Coronavirus COVID-19, dated 16 March 2020, at p. 1. This Commission now takes judicial notice that, since it issued AE 046, the Department of Defense placed the National Capital Region at Health Protection Condition C which instituted a maximum work-from-home effort across the Region. Additionally, the Governors of Virginia (Executive Order Number 55, dated 30 March 2020) and Maryland (Order of the Governor of the State of Maryland Number 20-03-30-01, dated 30 March 2020) and the Mayor of the District of Columbia (Mayor's Order number 2020-054, dated 30 March 2020) have issued "Stay at Home" orders which require the citizens of these jurisdictions to remain at their homes with limited exceptions, one of which is the conduct of governmental functions. The Virginia Order can be accessed at [https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-(COVID-19).pdf), last accessed on 8 April 2020. The Maryland Order can be accessed at <https://governor.maryland.gov/wp-content/uploads/2020/03/Gatherings-FOURTH-AMENDED-3.30.20.pdf>, last accessed on 8 April 2020. The District of Columbia Order can be accessed at <https://coronavirus.dc.gov/stayhome>, last accessed on 8 April 2020.

prove too untimely, cannot occur before 15 June 2020, and too risky to personal health of all involved.

3. The purpose and scope of these introductory telephone calls and any letter remains limited to and consistent with the Defense proffer in oral argument on 20 November 2019, “to determine whether, [the prospective witness] would be willing to have a discussion with [the Defense] at a later date.”¹⁰

4. Given the Defense’s asserted proposal of an initial contact with the seven (7) Defense Requested Witnesses for the sole purpose of developing rapport in order to gauge the possibility of follow-on substantive interviews, the Prosecution will not provide the “rights warning”¹¹ to any of the prospective witnesses at this time, but as noted above can provide information to orient the Defense Requested Witness.

5. The Prosecution’s request for clarification is **GRANTED**. The Prosecution’s request for reconsideration of AE 039H is **GRANTED IN PART**. The Prosecution’s renewed request for the Commission to issue the protective order in AE 039, Attachment B, is **DEFERRED**.

So **ORDERED** this 10th day of April, 2020.

//s//
DOUGLAS K. WATKINS
COL, JA, USA
Military Judge

¹⁰ Transcript at 514.

¹¹ See AE 039, Attachment A, to the draft proposed protective order.